88-1176

Supreme Court, U.S.
FILED
JAN 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-___

In The

Supreme Court of the United States

October Term, 1988

VANE NEWTON, *et al.*,

Cross-Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,

Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRUCE H. STOLTZE
(Counsel of Record)
BRICK, SECKINGTON, BOWERS,
SWARTZ & GENTRY, P.C.
550 39th Street, Suite 200
Des Moines, IA 50312
(515) 274-1450
Counsel for Respondents

KRISTIAN ANDERSON
(On the Brief)
BRICK, SECKINGTON, BOWERS,
SWARTZ & GENTRY, P.C.
550 39th Street, Suite 200
Des Moines, IA 50312

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals err in borrowing a six month statute of limitations established in § 10(b) of the National Labor Relations Act rather than the two year statute of limitations established in § 3 First (r) of the Railway Labor Act?

2. Did the Court of Appeals err in upholding the entry of summary judgment regarding the statute of limitation issues when factual issues were raised regarding the accrual date of the cause of action and the existence of facts would support the equitable tolling of the statute of limitations?

3. Does the existence of a fiduciary relationship between an employee and his union alter the analysis relating to the "discovery" of a cause of action that a court should use in deciding whether to equitably toll a statute of limitations?

LIST OF PARTIES

The following individuals are named as cross-petitioners in this matter:

Francis E. Amiot
Dennis D. Anderson
Mike Arispe
Robert B. Bailey
John E. Beghtol
Angeline V. Boll
Anthony C. Brackey
Kenneth W. Brevig
Larry D. Briegel
Douglas L. Brower
Jack E. Brown
Kenneth W. Brown
John E. Brunskill
Donald D. Buhmann
J. W. Burke, Jr.
Milton E. Capps
Jack L. Chambers
Dennis E. Chaplin
Todd F. Chumbley
B. J. Clark
Richard A. Clark
N. M. Cole
Richard E. Davidson
Richard F. Davis
David G. Dickey
Leland T. Dingman
Larry K. Dixon
William D. Dixon
Robert R. Doyle
Edward L. DuBois
Robert L. Duncan
Glen Dale Eads
Max A. Eads
Stephen R. Early
Paul E. Ellis
George R. Etherton
Randy E. Etherton
Joseph R. Fitzgerald
Don R. Foland
Tom A. Fox
Kenneth L. Frazier
Daniel J. Fuqua
James M. Gass
Tennis G. Gordon
Patrick M. Greene
Richard L. Guile
Alten R. Hammett
Ted E. Hanke
Orville E. Harger
John R. Harrison
Robert Eugene Harrison
Daniel H. Hein
Phillip H. Hein
William H. Hein
Earl F. Hill
Craig Harms Hornby
Debra Sue Hornby
David M. Johnson
Harold E. Johnson
Lloyd E. Johnson
Robert L. Judge
Dale Martin Keith
John F. Keith
Donald L. Kidd, Sr.
H. L. Kidd, Jr.
Kenneth F. Kimberling
Harold L. King
James L. Knox
Kerry S. Knutsen
Charles E. Long
Larry D. Love
Robert W. Luth

LIST OF PARTIES–Continued

James R. Maloney
James P. Manuel, Jr.
David R. McBroom
Donald P. McCaleb
Ralph L. McCoy
Jerry F. McCracken
Robert N. McCracken
Marvin Meeker
Daneil V. Middour
Charles H. Miller
Lowell D. Malloy
Roger L. Moore
Wayne A. Moore
Robert J. Murphy
John A. Myers
John D. Myers
John F. Myers
Richard A. Neuman II
Darrell Newman
Steven Arthur Newton
Vane Newton
Richard A. Nitcher
Oscar D. Overton
Jerry E. Payne
Robert J. Peoples
Richard N. Petersen
Harlan W. Peterson
Mark R. Pomeroy
Curtis E. Provance
James F. Ramsey
John E. Reece
T. J. Reed
Gary Grant Rogers
William E. Rosenstangle
Stephen D. Rosenstangle
Roger L. Rothamel
B. J. Rude
Joseph A. Rush
Dennis L. Schrader
L. Lee Beardsly
Daryl L. Schweiger
Karl W. Seeburger
Leo T. Seehan
Jack L. Shelton
Allan P. Sherling
James L. Smith
E. D. Snyder
Wilbur Stanton
Ronald J. Stearns
Hugh V. Steele
Charles T. Stickler
James L. Still
J. R. Stone
Dennis L. Stowe
John L. Strait
Paul W. Strawn
James W. Sundall
Roger L. Swift
Eugene R. Thelen
Clyde R. Thomas
Allan J. Thompson
Richard D. Thorsland
Robert J. Tollakson
G. N. Troxel
Terry B. Turvold
Howard A. Tuttle
James A. Tuttle
W. R. Urton
Ronald R. Werth
Marquis R. West
Larry E. Whitt
Billy Ray Wiggins
Donnie R. Wilford
Billy G. Williams
Larry L. Williams
Max R. Williams
Robert Lee Wilson
David G. Yackle
Gary E. Yezek
Eldon Zitterlich

LIST OF PARTIES–Continued

The following entities are named as cross-respondents in this matter: Brotherhood of Locomotive Engineers; Chicago and North Western Transportation Company; United Transportation Union, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees; and the Railroad Yardmasters of America.

The following individuals took part in the lower court proceedings, but do not appear as cross-petitioners:

Lloyd G. Andrews
Donald E. Bisgaard
La Don E. Crane
Sam H. Dean
A. M. McQuade
Frank M. Ramey
Arnold M. Scheel
Robert W. Shaner
John R. Vincent

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 4

I. This Court Should Resolve An Important Issue Regarding the Statute of Limitations For Actions Brought Under the Railway Labor Act, Since the Court Below and the Other Courts of Appeals Have Improperly Established A Six Month Limitation Period 4

II. The Eighth Circuit Erred In Its Application of Summary Judgment Principles to the Jurisdictional Issues Raised in This Case. 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES:

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) 5

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 10

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) 3, 4, 5, 6

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 8

Matsushita Electric Indust. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 10

Pride v. Peterson, 173 N.W.2d 549 (Iowa 1970) 9

Reed v. United Transportation Union, No. 87-1031, *cert. granted*, 99 L.Ed.2d 267 (1988) 7

Railway Labor Executives' Assoc. v. Gibbons, 455 U.S. 457 (1982) 8

Slocum v. Delaware, Lackawanna & Western Railroad Co., 339 U.S. 239 (1950) 6

West v. Conrail, 481 U.S. ___, 95 L.Ed.2d 32 (1987) 6

STATUTES:

28 U.S.C. § 1254(1) 2

29 U.S.C. § 160(b) 3, 5, 7

Railway Labor Act
45 U.S.C. § 153 First (r) 3, 4, 5

TABLE OF AUTHORITIES–Continued

Page

Regional Rail Reorganization Act
45 U.S.C. § 797b 3

45 U.S.C. § 797c 3

45 U.S.C. § 797m 3

Rock Island Transition and Employee Assistance Act
45 U.S.C. § 1004 3

45 U.S.C. § 1017 3

No. 88-___

In The

Supreme Court of the United States

October Term, 1988

VANE NEWTON, *et al.*,

Cross-Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,

Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORAI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Cross-Petitioners, former employees of the Chicago, Rock Island & Pacific Railroad Company ("Rock Island"), respectfully request that if a writ of certiorari issues to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, that the Court also issue a writ of certiorari based upon the issues raised in this cross-petition.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 850 F.2d 1255 (Pet. App. 1a-46a).[1] That opinion was issued upon a request for rehearing and superseded the court's earlier opinion which was reported at 836 F.2d 1493 (Pet. App. 47a-91a). The opinions, rulings, orders, and judgment of the United States District Court for the Southern District of Iowa which form the basis for the Court of Appeals' opinion are all unreported (Pet. App. 93a-127a).

JURISDICTION

The decision of the court of appeals upon rehearing was issued on June 15, 1988. Cross-Respondents filed petitions for rehearing and suggestion for hearing en banc. Those petitions were denied on September 14, 1988. Cross-Respondent Brotherhood of Locomotive Engineers filed its petition for a writ of certiorari on December 13, 1988. The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

Cross-Petitioners are filing this cross-petition pursuant to Supreme Court Rule 19.5. As required by Rule 21.1(e)(iii), cross-petitioners state that they received the petition filed in No. 88-968 on December 13, 1988. Since this cross-petition is being filed pursuant to Rule 19.5,

[1] All of the relevant opinions, rulings, orders, and judgments of the lower courts are contained in the appendix to the Petition filed in *Brotherhood of Locomotive Engineers v. Vane Newton, et al.*, No. 88-968. Citations to that appendix shall be designated "Pet. App.".

Supreme Court Rule 20.5 states that this cross-petition cannot be granted unless the Court grants the petition for writ of certiorari filed in No. 88-968.

STATUTES INVOLVED

Sections 105 and 122 of the Rock Island Transition and Employee Assistance Act, 45 U.S.C. § § 1004, 1017, and 45 U.S.C. § § 797b, 797c, and 797m are set forth at Pet. App. 128a-133a; Section 3 First (r) of the Railway Labor Act, 45 U.S.C. § 153 First (r), and Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) are set forth at Cross-Petition Appendix 1a.

STATEMENT OF THE CASE

Much of the background and underlying facts of this case are set forth in the Petition for Writ of Certiorari and Respondents' Brief in Opposition filed in *Brotherhood of Locomotive Engineers v. Newton*, No. 88-968. The additional facts which the Court will need to decide this cross-petition are set forth below.

1. The Eighth Circuit held that damage claims against the cross-respondents were barred because they were brought more than six months following the accrual of the causes of action (Pet. App. 24a-25a). The court relied upon reasoning similar to that contained in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). Cross-Petitioners had argued that the two year statute contained in Section 3 First (r) of the Railroad

Labor Act, 45 U.S.C. § 153 First (r), should be used in this case. In making that argument, cross-petitioners noted that Congress had struck a different balance in railroad labor cases than in other cases regarding the time limit for challenging an action involving labor relations which justified the use of a two year limitation period rather than a six month period.

2. Cross-Petitioners also argued that the limitation period should have begun to run within a reasonable time after June 20, 1983, rather than at the earlier date used by the district court. They argued that the factual record made it inappropriate to resolve the matter against them at the summary judgment stage of the district court proceedings, because evidence supporting their claim had been submitted into the record. Cross-Petitioners also argued that, in any event, the statute of limitations should have been tolled because the cross-respondents had fraudulently concealed certain facts from them. The Eighth Circuit rejected both of those arguments without comment.

REASONS FOR GRANTING THE WRIT

I. This Court should resolve an important issue regarding the statute of limitations for actions brought under the Railway Labor Act, since the court below and the other courts of appeals have improperly established a six month limitation period.

The Eighth Circuit determined that it should follow the reasoning of *DelCostello* and determine that a six month statute of limitation period should apply for

unfair representation claims brought under the Railway Labor Act. A similar conclusion has been reached by a number of other circuit courts.[2] Courts have rejected the argument that the two year period specified in Section 3 First (r) of the Railway Labor Act, 45 U.S.C. § 153 First (r), does not apply to cases such as this one. The various court's conclusions are purportedly based on the *DelCostello* analysis that there is a congressional attempt to have "relatively rapid final resolution of labor disputes" in all fields regulated by federal labor law. *DelCostello*, 462 U.S. at 168.

In analyzing whether the courts of appeals' analyses are correct, "[i]t should be emphasized from the outset, . . . that the National Labor Relations Act cannot be imported wholesale into the railway labor area. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969) (footnote omitted).

Section 3 First (r) relates to the time that an aggrieved party has to challenge the arbitration decision in a dispute governed by Section 3 First. Congress established a two year period for such an appeal. Thus, Congress balanced the needs for finality of a labor dispute and quick resolution of a labor dispute differently in the context of the Railway Labor Act than it has in other labor statutes. *Compare* 45 U.S.C. § 153 First (r) (two years) *with* 29 U.S.C. § 160(b) (six months).

---

[2] The cases which have reached similar conclusions are listed in the petition in No. 88-968 at pages 17-18.

Although courts which have analyzed this question have stated that the two year period specified in the Railroad Labor Act evidences different concerns than the six month period specified in the National Labor Relations Act, those courts have not paid sufficient deference to the intent of Congress.[3] In enacting the Railroad Labor Act, Congress meant to deal with certain specific concerns raised by the nature of labor-management disputes between railroads and railroad unions. At the time of its passage, many of the disputes that had arisen were quite contentious. *See, e.g., Slocum v. Delaware, Lackawanna & Western Railroad Co.*, 339 U.S. 239, 242 (1950) (the "plan of the Act is to provide administrative methods for settling disputes before they reach acute stages that might be provocative of strikes"). Congress, however, determined that a two year period was more appropriate than a shorter or a longer period to allow an arbitration decision to be challenged.

The ability of a party to challenge an arbitration two years after it was decided, and certainly much longer than two years after the underlying dispute arose, in a potentially contentious atmosphere, indicates that Congress believed that a two year period was not too long. Indeed, because of many of the tensions that existed (and still exist) in railroad labor matters, a longer period can

---

[3] The issue of whether a six month statute of limitations should apply to Railway Labor Act cases has not been decided by this Court. Although *West v. Conrail*, 481 U.S. ___, 95 L.Ed.2d 32 (1987) dealt with certain statute of limitations issues under the Railway Labor Act, it did not decide whether the six month *DelCostello* period should be applied to railroad cases.

be seen to help the parties to cool off and try to resolve their differences through discussion, rather than forcing parties to bring disputes to court within a six month period. Thus, the two year time limit specified in Section 3 First (r) was a rational and thoughtful decision by Congress not to rush railway cases into court.

The lower courts have failed to follow that congressional intent. Instead, they are forcing disputes to be resolved during a shorter time period than that specified in the Railway Labor Act. Because the lower courts have improperly grafted a six month limitation onto the Railway Labor Act, this Court should grant the cross-petition to resolve this matter, and insure that the statute is interpreted according to the intent of Congress.

In addition, this Court has a similar case pending before it. In *Reed v. United Transportation Union*, No. 87-1031, *cert. granted*, 99 L.Ed.2d 267 (1988) (case argued Nov. 2, 1988), this Court has been asked to decide whether the six month limitation period of *DelCostello* should apply to cases arising under § 101 of the Labor Management Reporting and Disclosure Act rather than a three year state limitation period. If the Court decides to hear the statute of limitation issue raised in this cross-petition, its decision in *Reed* and in this case can resolve a number of issues relating to the applicability of the six month limitation period of § 10(b) of the Labor Management Relations Act to all federal labor statutes.

II. The Eighth Circuit erred in its application of summary judgment principles to the jurisdictional issues raised in this case.

This case was decided on summary judgment motions in the district court. In opposition to those motions, cross-petitioners submitted evidence indicating that there was a factual dispute regarding which date should be used to start the running of the statute of limitations. Cross-Respondents contended that the causes of action accrued more than six months prior to the initiation of litigation. Cross-Petitioners, on the other hand, state that a reasonable time after June 20, 1983, was the correct date, since that was the day on which the sale of the assets of Rock Island to the Chicago & North Western Transportation Company ("CNW") was approved by the bankruptcy court. Prior to that time, there was great uncertainty regarding which carrier would obtain the assets and run the lines at issue.[4]

In addition, cross-petitioners argued that the statute of limitations should be tolled because the unions affirmatively mislead them regarding the union activities. *Cf. Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (equitable

---

[4] Indeed, the bankruptcy court's decision regarding the final distribution of assets was delayed for some time because of this Court's decision in *Railway Labor Executives' Assoc. v. Gibbons*, 455 U.S. 457 (1982). The *Gibbons* decision affected this matter since it declared that certain employee protection clauses in the RITEA were unconstitutional. Thus, that decision cast doubt upon the status of all agreements based on the initial version of the RITEA.

tolling doctrine "is read into every statute of limitations"). Cross-Petitioners argued that these misrepresentations were sufficient to toll the running the statute of limitations. In support of that proposition, they submitted affidavits describing the statements that were made by the unions.

In particular, cross-petitioners alleged that the statute could be tolled because they had exercised "due diligence" in discovering the existence of their claim against the cross-respondents despite the fraudulent concealment of that claim.[5] Their affidavits indicate that the cross-respondent unions misrepresented the need to challenge the seniority provisions and hiring conditions until after the purchase of the Rock Island assets was made final. Cross-Petitioners also argued that since that cross-respondent stood in a fiduciary relationship to them, the cross-respondents' actions constituted a fraudulent misrepresentation that they could reasonably rely upon. In connection with that argument, cross-petitioners noted that state law supported the relaxation of the evidence needed to show fraudulent misrepresentation when a fiduciary relationship exists between the parties. *See, e.g., Pride v. Peterson*, 173 N.W.2d 549, 555 (Iowa 1970). The Court of Appeals dismissed this argument without comment.

The movant has the burden to demonstrate in its summary judgment motion that there is no genuine issue

---

[5] The district court had held that equitable tolling of the statute of limitations was unavailable to cross-petitioners because they failed to demonstrate that they acted with "due diligence" and failed to show that there was fraudulent concealment of the claim (Pet. App. 112a).

of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In addition, all inferences for materials before a court deciding a summary judgment motion are to be interpreted in the light most favorable to the non-moving party. *Matsushita Electric Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The courts below disregarded those principles by not allowing this matter to go forward for a full hearing regarding the facts connected with the tolling of the statute of limitations, the date upon which the running of the statute of limitations should begin, and the availability of equitable tolling when a fiduciary relationship exists.

The actions of the lower courts raise several important issues which this Court should resolve. First, the decisions raise an issue regarding how a lower court should resolve jurisdictional issues in a summary judgment context. The lower courts simply appear to have presumed that the earlier dates were the proper dates for the start of the running of the statute of limitations, even though cross-petitioners attempted to raise factual issues regarding whether the seniority and hiring conditions were, in fact, "final" or whether they were interim conditions which became final on June 20, 1983.

Second, because this case took place in the context of a bankruptcy proceeding, it would be important for the court to resolve when a statute of limitations begins to run when there is uncertainty regarding the sale of assets during a bankruptcy proceeding. Thus, whenever there is a temporary transfer of assets which results in an agreement between the temporary owner and a labor union, the court should decide when that agreement becomes

final for purposes of filing an action under the applicable labor statute. The lower courts appear to decide that the statute of limitations *always* runs from the signing of an agreement, even when a transfer of ownership is not complete, and indeed may be uncertain. If that is the correct law, then the courts below are correct. If, however, the statute of limitations could begin on some other date, the lower courts incorrectly granted the summary judgment motion.

In addition, this case raises issues regarding the equitable tolling of a limitation period in a labor context. While the Courts recognize the union is a fiduciary to the union members, the courts have, without comment, failed to apply the fiduciary concept within the context of the application of a rather short and strict statute of limitations. That issue is an important one which should be resolved by this Court.

CONCLUSION

For the reasons stated above, cross-petitioners request that if this Court grants the petition in No. 88-968 by issuing a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, that it also grant this cross-petition and issue a further writ of certiorari.

Respectfully submitted,

BRUCE H. STOLTZE
(Counsel of Record)
BRICK, SECKINGTON, BOWERS,
SWARTZ & GENTRY, P.C.
550 39th Street, Suite 200
Des Moines, IA 50312
(515) 274-1450
Counsel for Respondents

KRISTIAN ANDERSON
(On the Brief)
BRICK, SECKINGTON, BOWERS,
SWARTZ & GENTRY, P.C.
550 39th Street, Suite 200
Des Moines, IA 50312

APPENDIX

ADDITIONAL STATUTE INVOLVED

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b):

(b) **Complaint and notice of hearing – Answer – Court rules of evidence inapplicable.** Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be serve upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board, or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said

proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

Section 3 First (r) of the Railway Labor Act, 45 U.S.C. § 153 First (r), states:

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.